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Via email: dsareview@facns.nsw.gov.au



11 March 2013

Submission to the review of disability legislation

Disability Services Act 1993 (NSW)

About Us

The Intellectual Disability Rights Service ('IDRS') is a community legal centre and disability advocacy service that provides legal and other advocacy to people with intellectual disability throughout New South Wales. IDRS's services include the provision of legal advice and legal advocacy for people with intellectual disability in NSW. IDRS advocates for policy and law reform and undertakes a range of community education with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which supports people with intellectual disability when they come into contact with the criminal justice system.

IDRS believes that the NSW Disability Services Act 1993 (the DSA) has not been implemented to its full potential for flexible, person-centred support based on individual choice and control for people with disability.

IDRS welcomes the review of disability legislation in NSW to underpin reforms to better cater for the needs and choices of people with disability in NSW.

Importance of Independent Advocacy in the person centred system

IDRS endorses the submission of the Disability Network Forum in stressing the importance of 'enhanced and sustained provision of independent advocacy and information alongside the person centred system'

In the experience of IDRS many people with disability seeking advocacy are those who have no personal advocate (family or friend) in their lives to assist them to resolve problems that arise unexpectedly. Some of these problems are in dealings with the disability sector but most often

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advocacy is about supporting people to negotiate a way through problems completely outside the disability sector.

Much of the demand for independent advocacy from people with disability arises from unexpected issues and problems. These are rarely anticipated and so the need for advocacy assistance to work beside the person to resolve them is also unlikely to be anticipated or included in a support plan.

Disability Legislation in NSW and at the Commonwealth level should provide the basis for independent advocacy to be available for people with disability when they need it alongside their person centred support services.

Objectives of Legislation

The language of the Objectives should reflect the rights of people with disability in NSW to receive services to meet their needs and enable them to achieve their personal aspirations. The Objectives should also specifically ensure active steps to remove barriers to the full inclusion of people with disability as equal members of the community.

The Objectives should mirror the United Nations Convention on the Rights of Persons with Disability.

Specific objectives should include:

- a. To ensure that every eligible person with disability has the opportunity to have a personal support plan and funds to meet their needs
- b. To ensure that every eligible person with a disability has the right to choose his/her disability supports and the provider of those supports
- c. To ensure that disability support providers are accountable to individual service users (see S4 (f) Disability Act 2006 (Vic))
- d. To ensure that the policies and practices of all government and government funded agencies protect and promote maximum opportunity for inclusion of citizens with disability in communities in NSW

Role of a lead public sector agency (eg Ageing Disability and Home Care)

We note there is continuing uncertainty about the operation of the National Disability Insurance Scheme (NDIS) and the schemes interaction with state government disability agencies and it is difficult to know what roles will be filled by other agencies.

IDRS notes that at present the roles of ADHC would seem to include:

- a. Service provider
- b. Service funder

- c. Policy developer
- d. Assessor of eligibility for disability support
- e. Monitor of service standards for its own and funded services
- f. Provider of information and referral
- g. Limited role as manager of complaints about funded services
- h. Liaison with other government agencies about disability issues
- i. Monitor of Disability Action Plans of Government agencies

There is enormous potential for conflict of interest in the many roles currently held by ADHC and these should be avoided in any new legislation.

IDRS believes it is essential that there continue to be a government service provider for people with disability in NSW operating under the NDIS.

IDRS is concerned that a system which relies heavily on market forces and the non-government sector alone may not serve the needs of all those with the highest or most demanding needs. We suggest there will need to be a NSW government provider safety net operating under the NDIS.

It is vital that the positive expertise that resides within ADHC is not lost to the disability sector in NSW which has a largely inexperienced workforce. There may be a role for the NSW government agency to provide a consultancy role under the NDIS.

Disability Commission

Some of the roles that sit with ADHC at present will continue to be essential and must be provided for in new legislation.

IDRS submits that disability legislation should provide for a **Disability Commission**, similar to that established under the Victorian Act but with a wider range of roles which could include:

- monitoring of standards (if this does not fall to the Commonwealth)
- identifying systemic gaps in meeting support needs in NSW
- identifying systemic issues and initiating inquiries at the state level
- continuing sector development
- complaints handling
- improving accessibility of NSW government agencies to people with disability including monitoring Disability Action Plans and possibly undertaking Disability Audits of government agencies
- active implementation of strategies to ensure the inclusion of people with disability in all aspects of the community in NSW

IDRS notes that most of the people we work with are struggling and often suffering in their dealings with mainstream agencies – police, courts, Community Services, transport, housing etc. in their daily lives.

The NDIS is only part of the picture in reducing the disadvantage that people with disability experience.

Principles

The Principles and Applications in schedule 1 of the DSA are expressed to be matters that the Minister should consider in providing funding. (s 6,7,9,10,12,13) to services. We suggest that in a person centred system, this should be changed so that the Principles are expressed as rights of the person with disability and obligations of the relevant minister in relation to individual funding.

The Vic Act sets out the Principles in a specific section, namely section 5 of that Act. We suggest the Principles should appear as a section in the legislation rather than a Schedule under the act.

The Principles should mirror the UN Convention on the Rights of Persons with Disability.

IDRS considers that many of the Principles in the current NSW DSA continue to apply. Some principles need to be strengthened to underpin the right to maximum choice and control (as per 'Objects' above).

Principles 5 (2) e and 5(2) f of the Victorian Act are vital but should be strengthened to provide that people with disability have the rights to

5(2) e **Make the decisions that affect their lives to the maximum extent possible** and to be provided with the information and support necessary for this to occur or

if the person does not have capacity to make their own decisions, the right to actively participate in decision making to the maximum extent possible and to be provided with the information and support necessary for this to occur

5 (2) f Receive information and communications in a manner which is most effective and appropriate for the person taking account of their disability. Also from the Disability Services Act (Vic) we suggest that 5 (3) (b), (c) and (f) are valuable additions.

Support Planning

Right to a support plan and funds.

The legislation should give the person with disability the right to a support plan based on their individual needs and aspirations and the right to a budget and funds to meet the cost of the support plan.

Planning

The Act should include **Principles to guide support planning**

The Principles outlined in the Disability Act 2006 (Vic) are a good starting point. In addition we suggest Principles should cover:

- The person's right to independent information about the planning process, who is available to support the person with planning, how decisions will be made and by whom, how a plan can be challenged communicated in a way that is effective for the individual.
- The person's right to independent information about the full range of possible options to meet the identified support need/aspiration communicated in a way that is effective for the individual.
- The person's right to participate in the planning process
- The person's right to have a support person or independent advocate support them through the planning process
- Plans should be regularly reviewed and able to be reviewed at the request of the person with disability or another person on their behalf
- The right of the person with disability, or their support person, to an explanation and written statement about the supports that will be provided, by whom and how that support will be provided, the cost of the supports in the plan.
- A regular statement about how the person's individual budget has been used should be available to the person and their support person.

We note that a simple mechanism for mediating/resolving disputes about support plans will need to be provided under the Act.

Should the legislation contain a power to specify the type of services and support that can be funded?

Such a power should be approached with caution. However, we note the great confusion that exists about what might be covered by individual funding. IDRS submits that, if there are to be any restrictions on what type of supports can be funded, these should be explicit in regulations under the legislation.

Contracts for services

IDRS experience, acting on behalf of people with intellectual disability, suggests that it is virtually impossible to establish the person's entitlements in relation to services provided. For example it is rarely clear what must be provided to someone in supported accommodation in return for the

payment that they make from their personal income, what security of tenure they have or what notice they are entitled to.

The legislation must provide clear guidelines about the nature of contracts with agencies providing support and the rights of the person with disability under those contracts.

Obvious issues are:

- If they need it, where can a person get assistance if the agency is not fulfilling its contractual obligations
- Clear information about what is to be provided under the contract and how the contract can be varied
- What rights does the person with disability have to terminate a service and under what conditions (eg notice etc) can this occur?

Regulation of Restrictive Practices

The regulation of restrictive practices should be included in legislation.

The starting point must be that the use of restrictive practices is exceptional, short term and must be justified as necessary to protect the safety and interests of the person with disability. It must not be a 'rubber stamp'. No system of regulation is adequate if it doesn't regularly say 'NO' to proposed restrictive practices. Any system of regulation of restrictive practices must include clear criteria which must be positively satisfied to justify approval.

The regulation of restrictive practices has two elements:

- Professional or clinical regulation so that any proposed restrictive practice is critically examined for its justification, appropriateness and validity in the person's circumstances and
- Regulation to ensure legal or human rights protection for the person

Both elements must be ensured in any legislation to authorise the use of restrictive practices.

What is the current system in NSW?

ADHC's Behaviour Support Policy is the key document which deals with restrictive practices in the context of behaviour support in NSW. This policy applies to both ADHC provided and ADHC funded services. The policy has no basis in legislation.

This ADHC policy defines 'prohibited' and 'restricted' practices (pp 11-13). Restricted practices must be approved through an '*internal Restricted Practice Authorisation Mechanism*'. In ADHC the

mechanism is the Restricted Practices Authorisation Panels. The policy simply says that ADHC funded services are expected to maintain a similar authorization mechanism. These authorization panels focus on 'professional /clinical regulation'. It is unclear to IDRS whether the Restricted Practice Authorisation Mechanisms are established in most funded services or what form they take.

IDRS submits that internal authorization mechanisms, such as these, are not independent and are not sufficiently removed from those proposing the restricted practice. There are obvious and real conflicts of interest in this arrangement. Nor does this internal process ensure a sufficiently 'expert' critique of the proposed restricted practice in the context of the individual's circumstances.

The policy also refers to the need for a legally valid consent to use the restricted practice. This includes substitute consent if the person with disability is

The Guardianship Tribunal plays a role in regulation of restrictive practices in NSW in response to applications for the appointment of a guardian with specific authority to make decisions about proposed restrictive practices for a person with disability. This process involves a hearing, participation by the person with disability wherever possible and hearing of evidence. These applications are decided in the context of the NSW Guardianship Act and the Section 4 Principles of that Act including the Section 4 Principles of that Act.

The need for the consent of an appointed guardian if restrictive practices are to be used for a person with disability is not explicit in guardianship legislation. It should be specifically referred to in any legislation to regulate the use of restrictive practices in NSW.

The Victorian Act has a lot to offer but it focuses primarily on the clinical regulation of restrictive practices and does not seem to adequately deal with the human and legal rights protection of the individual. For example, it does not appear to require that the person concerned be notified or that their views are considered or represented in the process leading to decisions about approval.

The Queensland Disability Services Act requires expert approval of the use of the proposed restrictive practice by the 'chief executive' as well as consent of a guardian in most instances. This is similar to the unlegislated practice in NSW.

IDRS proposes that any legislation important elements of any system to regulate the use of restrictive practices must ensure

- independent expert approval and oversight
- regular independent review
- time limited authorization and demonstrated active planning toward terminating the restrictive practice
- examination by a body that has statutory independence and is bound to adopt processes which protect the human rights of the person with disability, such as via guardianship

- that the use of restrictive practice is authorised and consented to only on the basis of the safety and interests of the person the practice will be applied to

Quality Standards for specialist disability services

IDRS submits that it will be necessary to include Quality Standards for specialist disability services in NSW until and unless these are to be provided in Commonwealth legislation which will apply in NSW.

The Disability Act 2006 (Vic) requires the Minister to determine service standards and performance measures and has penalties for non-compliance (see sections 97 and 98). Also in the Vic act the secretary can make directions for compliance by service providers with those standards and there are penalties for failing to comply, (see sections 99 and 100). We suggest that a similar section should be in the NSW legislation.

IDRS notes that a system of quality assurance including third party verification against the NSW Disability Service Standards is being introduced in NSW.

Given the central role to be played by the NDIS in the future, IDRS supports the legislative adoption of national standards for specialist disability service provision across Australia. IDRS suggests that service standards themselves could be in regulations referred to in the new legislation so that they can be regularly improved and updated.

Clear Contracts or Service Agreements for the provision of services

IDRS stresses that individual engagement of services must clearly identify, via contract or service agreement, the rights of the person with disability and obligations of services and there must be remedies available to the person with disability if the terms of the contract/agreement are not fulfilled.

The Victorian Act (s 57) mandates a written residential statement to be drawn up for anyone receiving residential services. In the experience of IDRS it is very difficult to identify the contractual rights and obligations of parties in relation to residential services in NSW.

The legislation should require a clear service agreement negotiated with the service user and outline minimum information to be covered in the agreement. This should be available for all types of services not just residential services. This should include information about how problems and disputes are to be managed as well as information about independent advocacy available to assist the person in raising problems or external complaints mechanisms.

An area covered in the Victorian Act and which is unregulated in NSW, is the informal management of a resident's personal money within a residential service. IDRS accepts that it is inevitable that a residential service will need to assist some people with intellectual disability to manage a strictly

limited amount of personal money if the person is incapable of managing their own money, they have no one in their life who can assist them and the person does not object to this.

Any new legislation should squarely address the rules and procedures that must be complied with to protect the resident as well as the service provider. The Victorian Act deals with this area at Section 93.

Complaints Mechanisms

We suggest that people with disability should have the same rights to make complaints as other members of the community. They should be able to complain about matters including assaults, abuse, harassment, their support plan, changes to their support plan, the quality of service provision, the support plan budget, and the management of the support plan budget and to have those complaints dealt with quickly, fairly and efficiently. Effective complaints handling will be even more important in a person centred system.

In the experience of IDRS the current complaints options are slow, frustrating and frequently ineffective for people with disability. It is virtually impossible for most people with intellectual disability to navigate the complaints system without strong, well informed and persistent advocacy from an advocacy organization or a personal advocate.

The complaints process generally directs people with disability to initially meet with their service provider to resolve complaints. People with disability frequently need and call upon assistance from an advocacy organization to assist them in this process. Mediation is also referred to as an option. However, there is no clear source of mediators. A complaint may then be taken to the Ombudsman. The Ombudsman may refer that complaint back to the service provider.

If the Ombudsman does decide to deal with the complaint and it is upheld, the available action is by way of recommendation to the service provider. If the service provider does not comply with the recommendation and does nothing to remedy the complaint, the person with disability may take their complaint to the Administrative Decisions Tribunal (ADT). The ADT may again refer the complaint back to the service provider, or may deal with the complaint.

We note that the Victorian Act provides for a Disability Services Commissioner with functions and powers set out in sections 16 and 17. The Disability Services Commissioner has comprehensive powers of investigation set out in sections 118 and 119. Under section 118 it can recommend what action the disability service provider should take to remedy a complaint, and under section 119 it can require a disability service provider to state what action it has taken to remedy the complaint. It

is unclear what happens if the disability service provider takes no action in response to the recommendation of the Disability Services Commissioner.

IDRS suggests NSW Disability Legislation should establish a Disability Commission with powers to investigate and to compel a service provider to carry out its recommendations following investigation. Further, it should be possible under the legislation to impose penalties on a service provider for not doing so. If the function of investigating complaints is to remain with the Ombudsman then the Ombudsman should be given such powers. We submit that the emphasis on **resolving** complaints with the service provider should be retained however a clear timeframe should be set for each part of the process.

Contracts for service provision should be able to be terminated, with reasonable notice, by the person with disability. This would allow the person to change service providers quickly and inexpensively if they are not satisfied with the service without having to make a complaint.

Official Community Visitors

We suggest that the role of Official Community Visitors as independent statutory appointees should be maintained in new legislation. Their powers of entry and investigation as in the CS CRAM Act should be retained. We suggest that they should be able to report directly to the Minister if they take the view that issues raised are not being addressed adequately by the Ombudsman. We suggest they should be required to meet with the Minister regularly to report directly on their findings.

It may be that the role of Official Community Services in a person centred system would be focused on the individual person with disability and whether the service/s used by the person was/were effectively fulfilling its obligations under the person's support plan and the resulting agreements in addition to the service adhering to disability service standards.

Administrative Appeals Tribunal (ADT)

We suggest that under current law, if the service provider does not agree to remedy an individual complaint, a person with disability has no alternative but to take the complaint to the ADT to achieve a result.

We believe that in reality the ADT is not accessible to people with intellectual disability because of the document preparation, its adversarial procedures, need for legal representation, delays, and the possibility of costs orders. Therefore we suggest that people with intellectual disability do not have the same rights as other members of the community to make complaints.

Other members of the community have rights in relation to the quality of goods and services through laws such as the Australian Consumer Law, and access to tribunals such as the Consumer Trader and Tenancy Tribunal to enforce those laws. If people with disability are to enjoy the same

rights in relation to specialist disability services then the law should set standards for service quality, and provide a quick, effective independent mechanism for them to enforce their rights.

People with disability should not be restricted in seeking remedy because the funds that purchase their services are provided by government. Under the person centred approach the funds are part of an individual service plan budget, therefore the person with disability can suffer real financial and personal loss, and they should have the right to legal action to recover that loss.

We suggest that a specialist tribunal should be established to hear matters that cannot be resolved with the service provider. That tribunal should have powers to inform itself of evidence as it sees fit, the procedures should be informal and there should be no costs orders. The specialist tribunal should be able to make orders including orders for service provision and orders to refund money to the support plan funds of the person with disability.

Conclusion

Intellectual Disability Rights Service appreciates the opportunity to provide input to the review of disability legislation in NSW. We look forward to the opportunity to provide further feedback on future draft legislation.

More information

If you require any further information or clarification or would like to discuss any aspect of this submission, please contact Janene Cootes, Executive Officer, on 02 9318 0144 or janene@idsr.org.au



